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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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| DIDDO CLARK,<br>Plaintiff and Respondent,<br>v.<br>LOUISE CLARK, et al.,<br>Defendants and Appellants. | A118811<br><br>(Contra Costa County<br>Super. Ct. No. C05-02007) |

This litigation between Diddo Clark and her mother Louise Clark[1] arose from a dispute about Diddo's use of a house located on property owned by the Clark Family Trust, of which Louise is a trustee. After a trial, the court entered judgment in favor of Louise based upon the jury's finding that she was a victim of financial elder abuse. The jury determined that Diddo had retained the property for a wrongful use and her conduct was a substantial factor in preventing Louise from selling or renting the property. Although the court determined that Louise was entitled to recover attorney fees on her financial elder abuse claim, it denied her request for a protective order against Diddo. The judgment also incorporated the jury's awards in favor of Louise of $100,000 on a claim for intentional infliction of emotional distress and punitive damages of $100,000. In response to Diddo's timely motion for judgment notwithstanding the verdict (JNOV), the court granted the motion, in part, and set aside the jury's finding of financial elder

[1] Where appropriate, we will refer to the parties and other members of the Clark family by their first names for clarity.

abuse and the monetary awards for intentional infliction of emotional distress and punitive damages.

Louise appeals, challenging the post judgment order granting partial JNOV and the court's refusal to issue a protective order. We affirm the court's refusal to issue a protective order, but agree with Louise that the court erred in granting partial JNOV. Accordingly, we reverse.[2]

## FACTUAL AND PROCEDURAL BACKGROUND

At the time of this litigation, Diddo's parents, Louise and Johnson, were both over 65 years of age, and they were the creators and co-trustees of the Clark Family Trust. Diddo is one of their six children.

In 2000, Diddo was living in an apartment complex in Lafayette. Because Diddo was having problems at the apartment complex and she was not paying any rent, Louise and Johnson decided to provide another place for Diddo to reside. A house foundation was constructed on a lot in Lafayette (hereinafter referred to as the Deer Hill property), which was owned by the Clark Family Trust. A pre-manufactured house was purchased and installed on the foundation. The house had three bedrooms, two bathrooms, an unfinished basement area, and a three-car garage. The house cost $920,000, which did not include the cost of the land, and at the time of the trial, the house was worth between $800,000 and $900,000.

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[2] The notice of appeal names as appellants, Louise Clark and Johnson Clark, individually, and as trustees of the Clark Family Trust. Throughout the litigation, Diddo's father, Johnson, was named as defendant, individually and as a co-trustee of the Clark Family Trust. Johnson died on April 27, 2007, the day that the court entered judgment in this matter. Upon Johnson's death, his son Steven (Diddo's brother) was appointed co-trustee of the Clark Family Trust and Louise remains as the other co-trustee; by order dated October 4, 2007, this court substituted Steven, as successor in interest pursuant to Code of Civil Procedure section 377.10 et seq., in the place of Johnson, as a named appellant. Louise's opening brief seeks relief only in her individual capacity, and not as a trustee of the Clark Family Trust. Because no briefs have been filed on behalf of Steven, or the trustees of the Clark Family Trust, the appeals by Steven Clark and the trustees of the Clark Family Trust are dismissed.

According to Louise, the house was delivered in move in condition but Diddo did not like certain features, and she wanted to make many changes to the house that would have cost more than her parents had planned to spend on the house. Diddo asserted that the house was not delivered in move in condition. However, despite any problems, Diddo moved some of her personal property into the house. She also ate at the house on a regular basis and slept there, and she conducted political meetings and had her law office at the house.

In June 2002, Louise and Johnson thought they had an agreement with Diddo regarding Diddo's use of the Deer Hill house. According to Louise, Diddo was given the use of the house and $10,000, if she did not ask for any more money, she accepted the house "as is," and she vacated her apartment and moved into the house. Diddo was given the $10,000, and Louise believed that the house was then finished. However, Diddo did not vacate her apartment and move into the house.

On September 23, 2003, Diddo sent Louise an email, which was also sent to some of Louise's attorneys, long-time friends, and family members. The email criticized Louise using vituperative language. After she received the e-mail, Louise felt "very sorry." A number of her friends called her about the email and they discussed it. When asked how she felt discussing the email with friends, Louise replied that it was probably one of the worst things that could happen to a parent.

Later in 2003, Diddo slipped into her parents' home and without permission, she made a copy of Louise's Christmas card list. Ditto sent a postcard enclosed in an envelope to over 100 people on her mother's Christmas card list, including many neighbors, and people Louise knew for almost fifty years. The postcard criticized Louise using the same vituperative language as in the earlier email. Louise's friends received the postcards and some of them sent the postcards to her. Louise was "just devastated" when she learned that an out of state friend, whom she had not seen in twenty years, had received the postcard.

At some unspecified time, Diddo also posted about a dozen signs around Lafayette; some were posted in Louise's neighborhood and some were posted several

miles away. Diddo picked locations where people would be driving at a speed slow enough so they could read the signs. The signs were 2 feet by 3 feet, and handwritten in orange letters on a white board and black letters on a white board. Some of the signs used the same vituperative language used in the email and postcard. When Louise saw the signs she was "horrified." Louise and some of her friends took down the signs. Johnson threw some of the signs away, and Louise gave two signs to her attorney. The signs were thrown away because they made Johnson and Louise "sick."

Around August 2004, Diddo's parents told her that they had decided to sell the Deer Hill house. Diddo had not moved into the house and she had continued to reside in her apartment without paying any rent. Louise believed she had the right to sell the house because it was her house, and that after she told Diddo that the house was being sold, Diddo had no right to keep her personal property at the house.

On or about July 4, 2005, Diddo posted flyers in her parents' neighborhood. The red paper flyer was 8-1/2 inches by 11 inches, and disparaged both Louise and Johnson using the same vituperative language as in the earlier email, postcard, and signs. The flyer included the Clarks' home address in small letters. The flyers were posted on telephone poles along the block where Louise lived and along Hidden Valley Road; there were maybe two dozen postings. Diddo admitted posting the flyers, but she did not recall the number of postings: more than 10 but less than 100. Louise's neighbor took down about six or seven flyers that she had found all around the neighborhood. When Louise saw the flyer, she felt "very, very sad." Louise did not understand Diddo's explanations for using the disparaging language in the flyer. Johnson threw away all of the flyers except one which Louise gave to her lawyer.

On July 19, 2005, Louise and Johnson hired a locksmith, who changed the locks on the house to allow them access. Louise removed from a house window signs that said it was a defective house. There was also a sign stating this is a defective house, that was placed in the landscaping and visible from the street. Louise removed the signs because she believed that it would be very difficult to sell the house if those signs were posted in full view. Diddo admitted that she had placed the signs in the house window. After the

locks were changed and her parents left the property, Diddo broke into the house that night and changed the locks again.

On August 2, 2005, Louise and Johnson sent Diddo a letter telling her that she was "not to enter the property" except to arrange to recover her personal property from the house. They offered to reimburse Diddo for any reasonable expenses incurred to improve the house for which Diddo had documents, less any expenses her parents had incurred to satisfy her monetary demands since she had "originally promised never to ask for or expect any further consideration from" them. The letter concluded with a statement that Diddo's parents would dispose of the house as they determined to be best.

Diddo did not provide her parents with any expense receipts for improvements to the house, nor did she remove her personal property from the house. Instead, on August 19, 2005, Diddo recorded a mechanic's lien against the property. The lien was for landscaping services performed by Diddo, doing business as Diddo Clark, landscaper, for $99,600, calculated at the rate of $50 per hour, 12 hours per week, for 166 weeks from June 8, 2002 to August 13, 2005, which services had been allegedly furnished directly to the owners at the owners' request. At trial, Louise denied that she ever told Diddo that she would be paid for landscaping expenses, and the lien was not paid after it was filed. Louise also believed that Diddo had filed another lien for "a lot of money."

In a letter dated September 21, 2005, Louise's attorney gave Diddo notice that her right to occupy the house was terminated because she had violated an express condition of her right to use and occupy the property, by, among other things, her "incessant demands for changes to the house and for other compensation," and by her "other abusive and extortionist conduct, illustrated again by [her] recent unlawful filing of a mechanic's lien on the property . . . ." Diddo was given 30 days to remove her personal property and surrender and deliver possession of the property to her parents. Otherwise, her parents threatened to sue her to recover possession and seek damages, including statutory damages, costs and attorney's fees.

Diddo did not remove her personal property from the house. Instead, on the same day that the September 21, 2005 attorney's letter was hand delivered to Diddo, she filed a

lawsuit against her parents, seeking to quiet title to the house, and for breach of contract, fraud, deceit, negligence, and injunctive relief. In December 2005, Diddo added the Clark Family Trust as a named defendant.

Diddo's complaint was based upon a written agreement signed by her parents and dated June 8, 2002, in which her parents agreed to give her the use of the Deer Hill property as is, plus $10,000, while they were living, and the property's ownership free and clear after they were deceased "on the condition that she never ask for or expect any further consideration from [them]." Diddo sought monetary damages of $1 million and a judgment that she had a life estate in the Deer Hill property for her parents' lives and title in fee simple upon her parents' death, and that her parents had no interest in the property adverse to Diddo.

On a Sunday morning in November 2005, Diddo posted flyers on the windshields of cars that were parked near the church attended by the Clark family. When asked how many cars she posted the flyer on, she replied, "Not enough." Diddo also dropped off copies of the flyer at the Lafayette Police and the City Council. Diddo would not have been surprised if she had mailed the flyer to some of her parents' friends. The flyer complained that the Clarks were in dire straits emotionally and spiritually and blamed Louise for various family troubles. When Louise saw a copy of the flyer, she felt that she had been kicked in the stomach.

In January 2006, Louise, Johnson, and the Clark Family Trust, filed a cross-complaint, seeking to quiet title to the property in the trust, and alleging a financial elder abuse claim for Diddo's retention of the Deer Hill property after her parents had asked her for access to the property. In addition, Louise sought compensatory and punitive damages for intentional infliction of emotional distress based upon Diddo's distribution of emails, postcards, and posted signs around Louise's home "containing a litany of outrageous and vitriolic comments" about Louise.

Before trial, the court resolved Diddo's claims for breach of contract, fraud, to quiet title and for a permanent injunction and a related request for preliminary injunctive relief, and the Clark Family Trust's quiet title claim. The court found Diddo had

admitted that she "voided" the June 8, 2002 written agreement, and that she had violated one contractual condition of the agreement, thereby relieving the Clark Family Trust of any further duty to perform under the agreement. The court also found no merit to the fraud claim because Diddo admitted that her parents had intended in good faith to convey title to the property if Diddo complied with the conditions in the agreement. The parties' competing claims to quiet title were adjudicated in favor of the Clark Family Trust. The court determined that the Clark Family Trust owned the fee title to the Deer Hill property, and that Diddo had no right or title to, or interest in, the property. Additionally, by an order filed April 19, 2006, the court preliminarily enjoined Diddo from entering the Deer Hill property, performing or causing to be performed any work on the property, disparaging or encumbering the title or condition of the property, and she was directed to restore all property keys to the trustees.

At a jury trial in January 2007, Louise and Johnson presented evidence on the claim for financial elder abuse, and Louise's claims for intentional infliction of emotional distress and punitive damages. The jury found for Louise on her claim for financial elder abuse, concluding that Diddo had retained the Deer Hill property for a wrongful use, and that Diddo's conduct was a substantial factor in preventing Louise from selling or renting the property. The jury also awarded Louise $100,000 for intentional infliction of emotional harm and awarded the sum of $100,000 in punitive damages after finding that Diddo had engaged in conduct with malice or oppression.

On April 27, 2007, the court entered judgment based upon the jury's verdicts. Louise was awarded the sum of $100,000 on the intentional infliction of emotional distress claim and $100, 000 in punitive damages. Based upon the jury's finding that Louise was a victim of financial elder abuse, the court directed that Louise was entitled to recover her costs and reasonable attorney's fees, but refused her request for a protective order against Diddo. The judgment also included provisions quieting title to the Deer Hill property in the Clark Family Trust, and prohibited Diddo from making "further claim to Deer Hill Property adverse to the Clark Family Trust, by legal action or otherwise, on

the basis of any fact or facts that were proved or that might have been proved in this action."

After entry of the judgment, the court denied Diddo's motion for a new trial. However, in response to Diddo's motion for JNOV, the court granted the request, in part, by setting aside the jury's finding that Diddo committed financial elder abuse, and vacating the monetary awards for intentional infliction of emotional distress and punitive damages in favor of Louise. Louise now appeals from this post judgment order granting partial JNOV.[3] (Code Civ. Proc., § 904.1, subd. (a)(2); see also *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651-652; *Dominguez v. City of Alhambra* (1981) 118 Cal.App.3d 237, 241-242.) [4]

## DISCUSSION

### I. Standard of Review

We apply well established standards in reviewing an order granting JNOV, in whole or in part. As an appellate court, our review is "de novo using the same standard

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[3] Although Diddo, representing herself in propria persona, filed a notice of appeal from the April 27, 2007, judgment, we dismissed her appeal because she failed to file a timely opening brief. We also denied Diddo's requests to file a late respondent's brief to Louise's appeal. Because Louise has not requested oral argument, we shall decide Louise's appeal on the record and her opening brief. (Cal. Rules of Court, rule 8.220(a)(2); *Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 334.)

[4] An order granting JNOV is generally not appealable because it can be appealed as part of the final judgment. (See *Jordan v. Talbot* (1961) 55 Cal.2d 597, 602.) However, in this case, the post judgment order granting partial JNOV finally resolves the litigation between the parties. "Nothing remains for future consideration, and no other opportunity exists for appellate review." *(Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381, 1389.) Accordingly, if the post judgment order was not appealable pursuant to Code of Civil Procedure, section 904.1, subdivision (a)(2), in the interest of judicial economy, we would view it " 'as a final judgment and hence appealable as such' under section 904.1, subdivision (a)(1). [Citation.]" *(Los Angeles Times v. Alameda Corridor Transportation Authority, supra,* 88 Cal.App.4th at p. 1389; see also *Beaver v. Allstate Ins. Co*. (1990) 225 Cal.App.3d 310, 330 ["An order granting partial [JNOV] has the effect of modifying the judgment on the verdict. If the trial court otherwise upholds the verdict, then the judgment, as modified by the partial [JNOV], is immediately appealable"].)

as the trial court. [Citation.]" (*Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal.App.4th 1175, 1194.) An order granting JNOV "may be sustained only when it can be said as a matter of law that no other reasonable conclusion is legally deducible from the evidence and that any other holding would be so lacking in evidentiary support that the reviewing court would be compelled to reverse it or the trial court would be required to set it aside as a matter of law. [Citation.] The court is not authorized to determine the weight of the evidence or the credibility of witnesses. [Citation.] Even though a court might be justified in granting a new trial, it would not be justified in directing a verdict or granting [JNOV] on the same evidence. [Citation.]" (*Spillman v. City etc. of San Francisco* (1967) 252 Cal.App.2d 782, 786.) We conclude that given our limited authority, we must reverse the trial court's post judgment order granting partial JNOV.

## II. Financial Elder Abuse Claim

At the time of the trial in this case, the Elder Abuse and Dependent Adult Civil Protection Act of 1991 (Welf. & Inst. Code, § 15600, et. seq.) (Elder Abuse Act), provided, in relevant part, that " '[f]inancial abuse' of an elder" occurred when a person either took, secreted, appropriated, or retained, or assisted in taking, secreting, appropriating, or retaining real property of an elder "for a wrongful use." (Former Welf. & Inst. Code, § 15610.30, subd. (a)(1), (2); Stats. 2000, ch. 442, § 5; see also Stats. 2000, ch. 813, § 3). A "wrongful use" was defined as acting "in bad faith," in that the abuser "knew or should have known that the elder . . . had the right to have the property transferred or made readily available to the elder . . . . or to his or her representative." (Former Welf. & Inst. Code, § 15610.30, subd. (b)(1).) And, a person should have known of an elder's right to the property "if, on the basis of the information received," " it [was] obvious to a reasonable person that the elder . . . ha[d] [such] a right . . . ." (*Id.*,

subd. (b)(2).)[5] "For purposes of this section, 'representative' means a person or entity that is either of the following: [¶] (1) A conservator, trustee, or other representative of the estate of an elder. . . . [¶] (2) An attorney-in-fact of an elder . . . who acts within the authority of the power of attorney." (Welf. & Inst. Code, § 15610.30, subd. (d).)

Louise presented evidence from which the jury could reasonably conclude that Diddo's conduct met the statutory description of financial elder abuse as defined in the Elder Abuse Act at the time of the trial. It was not disputed that Louise was over 65 years of age at the time of the dispute regarding Diddo's use of the Deer Hill property. Because the June 2002 written agreement was not admitted as an exhibit at trial, the jury was free to accept Louise's testimony regarding the terms of the agreement. According to Louise, Diddo had been given use of the Deer Hill property on the express conditions that she move out of her apartment and into the house, that she accept the Deer Hill house as is, and that, upon receipt of $10,000, Diddo would not expect any further monetary

[5] Since the trial in this case, Welfare & Institutions Code section 15610.30 defining financial elder abuse has been revised. (Stats. 2008, ch. 475, § 1.) The statute now reads that "[a] person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult." (Welf. & Inst. Code, § 15610.30, subd. (b).) Additionally, "a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult." (*Id*., subd. (c).) The new language "clarifies to a great degree what kind of conduct constitutes financial abuse, what instrument of transfer would be subject to scrutiny, and that it matters not if the elder or dependent adult holds the property right directly or indirectly through others." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1140 (2007-2008 Reg. Sess.) as amended Mar. 10, 2008, p. 10.) Also, "[t]his definition of taking for a wrongful use [shifts] the proof required from the defendant's knowledge or presumed knowledge of the elder's or dependent adult's right to the property taken, to the defendant's knowledge or presumed knowledge of the effect of the taking on the elder or dependent adult, to which a reasonable person standard may be applied." (*Id*. at p. 11.)

assistance from her parents. The jury could reasonably have found that Diddo knew or reasonably should have known that if she did not meet the conditions set by her parents, she would not have a sustainable claim to retain possession of the property after her parents asked her to return the property to them. Diddo's pursuit of a lawsuit against her parents forced them to employ legal counsel to protect their rights to the property, and to subsequently seek judicial relief for which they could request the heightened remedies of attorney fees and a protective order under the Elder Abuse Act. (Welf. & Inst. Code, §§ 15657.03, 15657.5, subd. (a).)

In dismissing the financial elder abuse claim, the trial court did not conclude that the evidence was insufficient as a matter of law to establish that Diddo had committed financial elder abuse as then defined under the Elder Abuse Act. Instead, the court declined to allow the claim for the following reasons: "There are no reported cases addressing elder financial abuse in the context of residential real estate, where the person retains occupancy of the premises after being directed to vacate. In general, occupants of real property have certain rights, and cannot be compelled to depart in the absence of a court order. [Citation.] Property owners are given expedited remedies to obtain possession of their real property. It would be anomalous to hold that a tenant who chooses to require a property owner to comply with the applicable law before eviction can later be sued for insisting on that legal right, simply because the landlord or property owner is 65 years of age or older." We conclude that the court's reasons do not support granting JNOV on the financial elder abuse claim in this case.

The Elder Abuse Act was enacted to provide for the "private, civil enforcement of laws against elder abuse and neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33.) The statutory provisions governing financial elder abuse are not limited to mentally incompetent or physically impaired elders, or persons of limited financial means. An elder is defined solely as "any person residing in this state, 65 years of age or older." (Welf. & Inst. Code, § 15610.27.) Additionally, at the time it was enacted, "[t]he 2000

amendment [to the Elder Abuse Act] strengthened the definition of financial elder abuse by providing that financial elder abuse occurs whenever a perpetrator 'takes, secretes, appropriates, or retains real or personal property of an elder' for a wrongful use or with intent to defraud . . . . [Thus,] a person [could be found] guilty of committing financial elder abuse so long as it would be obvious to a reasonable person that that taker [was] not entitled to the elder's assets." (Birkel et al., *Litigating Financial Elder Abuse Claims* (Oct. 2007) Los Angeles Lawyer p. 20, fn. omitted.)

The trial court's concern that upholding the jury's verdict in this case would allow an elderly landlord to sue a tenant and seek the heightened remedies available under the Elder Abuse Act simply because the tenant chose to insist that the landlord comply with applicable eviction laws is misplaced. The premise of the financial elder abuse claim in this case was not based upon a typical situation involving a landlord whose tenant has breached some condition of a lease for which a summary remedy is afforded by Code of Civil Procedure section 1161.[6] Rather, this case was pleaded and tried on the theory that Diddo was given a life estate in the Deer Hill property that was subject to certain conditions that she knew or reasonably should have known she had breached, thereby requiring her to vacate the property when Louise requested its return. When Diddo sued Louise, Louise was forced to hire legal counsel to defend her rights to the property, and which allowed her to seek the heightened remedies under the Elder Abuse Act. Given Diddo's claim for possession of the property as a life tenant, the summary proceeding of an unlawful detainer action was not available to Louise. (See *Harper v. Raya* (1984) 154 Cal.App.3d 908, 913; *Bekins v. Smith* (1918) 37 Cal.App. 222, 226.)

Whether an elderly person may seek the enhanced remedies available under the Elder Abuse Act in a typical landlord tenant situation is not before us, and we express no

[6] Section 1161 of the Code of Civil Procedure, provides, in the first sentence: "A tenant of real property, *for a term less than life*, . . . is guilty of unlawful detainer . . . ." (Italics added.)

opinion on the matter. We conclude only that the evidence in this case supports the jury finding of financial elder abuse as then defined by the Elder Abuse Act. We see no reason to "provide less protection for the elderly . . . and to make it harder to obtain relief . . . than otherwise provided by the statutory scheme" that was in effect at the time of the trial in this case. (*Bookout v. Nielsen* (2007) 155 Cal.App.4th 1131, 1140.) Because there was substantial evidence to support the jury's verdict, the grant of JNOV on the financial elder abuse claim must be reversed.

## III. Protective Order Under Elder Abuse Act

Welfare and Institutions Code allows a victim of financial elder abuse to seek a protective order against the perpetrator of the abuse. (Welf. & Ins. Code, § 15657.03, subd. (a).) The statute defines a "protective order" to mean "an order that includes any of the following restraining orders, whether issued ex parte, after notice and hearing, or in a judgment: [¶] (1) An order enjoining a party from abusing, intimidating, molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, or coming within a specified distance of, or disturbing the peace of the petitioner. [¶] (2) An order excluding a party from the petitioner's residence or dwelling, except that this order shall not be issued if legal or equitable title to, or lease of, the residence or dwelling is in the sole name of the party to be excluded, or is in the name of the party to be excluded and any other party besides the petitioner. [¶] (3) An order enjoining a party from specified behavior that the court determines is necessary to effectuate orders described in paragraph (1) or (2)." (*Id.*, subd. (b).) The trial court "may" issue an order under section 15657.03, "with or without notice, to restrain any person for the purpose of preventing a recurrence of abuse, if an affidavit shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse of the petitioning elder or dependent adult." (*Id.*, subd. (c).)

After the jury's finding of financial elder abuse, Louise asked the court to include in its judgment a protective order providing, among other things, that Diddo be prohibiting from "continuing her unauthorized behavior. She should specifically be prevented from intimidating [or] harassing" Louise, "coming within 100 yards" of Louise, her residence, or the Deer Hill property, and "from taking, secreting, appropriating or retaining any real or personal property of" Louise, including the Deer Hill property. At a hearing on the request for entry of judgment, the court denied Louise's request that the judgment incorporate the requested protective order as unnecessary and overly broad.

Initially, we note that Louise's notice of appeal that appears in the record does not specify that she is appealing from the April 27, 2007, judgment that would have brought up for review the court's refusal to incorporate a protective order in the judgment. (Code Civ. Proc., § 906.) Instead, the notice of appeal is limited to the post-judgment order granting partial JNOV, and it "neither specifies [the judgment] nor makes it ' "reasonably clear" ' [Louise was] trying to appeal from it. [Citation.]" (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239; see *Shiver, McGrane & Martin v. Littell* (1990) 217 Cal.App.3d 1041, 1045-1046.) Also, there is nothing in the notice of appeal that indicates Louise intended to challenge the denial of the protective order assuming the JNOV on the financial elder abuse claim was reversed on appeal. Consequently, Louise has not shown that her challenge to the court's denial of the protective order is properly before us.

Even assuming the matter were before us, we would uphold the denial of the protective order. Contrary to Louise's contention, the court did not misinterpret its statutory authority. It explicitly acknowledged its authority to issue a protective order based solely on the jury's finding of a past act of financial elder abuse, and that such a protective order could issue even without evidence of an actual threat of future misconduct. It appropriately recognized, however, that a court is not mandated to issue a

protective order solely upon a past act of abuse, and that it was for the court to determine what kind of restraining order is appropriate. (Welf. & Inst. Code, § 15657.03, subd. (c) [court "may" issue an order "for the purpose of preventing a recurrence of abuse"].)

In this case, the court incorporated in its judgment an order enjoining Diddo from "further claim to Deer Hill Property adverse to the Clark Family Trust, by legal action or otherwise, on the basis of any fact or facts that were proved or that might have been proved in this action." In denying Louise's request for a broader protective order requiring Diddo to stay away from her, the trial court held that such an order was not necessary to prevent a recurrence of abuse as there was no risk of any additional financial elder abuse. In so ruling, the court noted, in pertinent part, that Diddo's retention of the Deer Hill property had occurred more than a year before, Diddo had left the property and not returned, and she had made no attempt to interfere with the sale of the property. Also, Diddo had no other property that she could possibly keep from Louise. Further, the court commented that Diddo had been sent a "message" by the jury's monetary awards for Diddo's conduct that formed the basis of Louise's intentional infliction of emotional distress claim, which awards will be reinstated by our decision. Therefore, if the issue were properly before us, on this record we would see no reason to disturb the court's ruling. Of course, Louise may renew her application for a protective order if the need arises in the future.[7]

## IV. Intentional Infliction of Emotional Distress

The jury awarded the sum of $100,000 to Louise for intentional infliction of emotional distress based upon Diddo's distribution of an email, postcards, and signs and flyers that publicly disparaged her mother. The trial court found that "reasonable minds" might differ as to whether Diddo's conduct was sufficiently egregious to rise to the level

[7] Although Louise cannot seek an "emergency" protective order based solely on financial abuse (Fam. Code, § 6250, subd. (d)), she may seek an emergency protective order for any other abusive conduct. (*Ibid*.)

of outrageous as that term is used in the context of a claim for intentional infliction of emotional distress. However, the court set aside the jury's verdict on the ground that Louise's testimony regarding her reactions to Diddo's conduct was not of sufficient severity from which a jury could find that Louise suffered severe emotional distress. We conclude that the court's reason for granting JNOV is unavailing.

The elements of a cause of action of intentional infliction of emotional distress are: "(1) outrageous conduct by the defendant; (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 394 (*Fletcher*).) At issue here is only the third element, namely, whether the evidence showed that Louise "suffered emotional distress of sufficient severity to establish the tort." (*Ibid.*)

"[R]ecovery may be had for emotional distress alone without resulting physical disability," (*Fletcher, supra,* 10 Cal.App.3d at pp. 396-397), and " 'the right to compensation exists even though no monetary loss has been sustained' [Citations.]" (*Grimes v. Carter* (1966) 241 Cal.App.2d 694, 699). "[E]motional distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry." (*Fletcher, supra*, 10 Cal.App.3d at p. 397.) " 'The emotional distress must in fact exist, and it must be severe.' [Citations.]" (*Id.* at p. 396.) "The term 'severe emotional distress' is discussed in comment *j* to section 46 of the Restatement Second, of Torts . . . . 'Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and duration of the distress are factors to be considered in determining its severity.' It appears, therefore, that in this context, 'severe'

means substantial or enduring as distinguished from trivial or transitory. Severe emotional distress means, then, emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it. [¶] 'It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.' [Citation.]" (*Fletcher, supra*, 10 Cal.App.3d at p. 397.)

We cannot agree with the trial court's ruling that the severity of Louise's emotional distress was improperly submitted to the jury because her emotional distress was neither "particularly long lasting" nor "so substantial that 'no reasonable person in a civilized society should be expected to bear it.' " The magnitude of Diddo's outrageous conduct of publicly disparaging her mother, taking the incidents as a course of conduct, resulted in Louise being "just devastated"; "horrified"; feeling "very, very, sad," and like "she had been kicked in the stomach"; and some of the conduct made her "sick." Louise's testimony, and the reasonable inferences to be drawn from it, was sufficient to allow the matter of the severity of her emotional distress to be resolved by the jury, which was appropriately instructed on the matter. Because there was substantial evidence to support the jury's verdict, the grant of JNOV on the claim for intentional infliction of emotional distress must be reversed.

## V. Punitive Damages

After the jury found for Louise on her claim for intentional infliction of emotional harm, she presented the following evidence on her claim for punitive damages:

Charles Clark, Diddo's brother, testified regarding his and Diddo's ownership interests in several commercial properties at the time of the trial. Specifically, Charles and Diddo each owned (1) 10.14 percent interest in the Monte Cresta Apartments, (2) 16 percent interest in La Posada Apartments; (3) 5.2 percent interest in The Grove at Sunrise Apartments; (4) 11.8 percent in Pleasanton Manor (also known as Orchard Square); (5) 16.67 1/6th percent of La Playa Apartments; and (6) 9.09 percent or 1/11th interest in

Davis Fine Arts, LLC, which was one entity of many that owned 74 percent of Allegra Apartments. Through the Clark Children's Trust, Charles and Diddo each owned 8.17 percent of the Alta Vista and El Cerro Apartments.

Charles valued his share of the net worth of the properties (the value of the properties less liabilities) at roughly $2.5 million, and Diddo's share of the net worth of the properties was similarly valued at about $2.5 million. As far as Charles knew, Diddo did not have a mortgage to pay, she paid cash for "that new car," and she did not have any other significant debts.

Charles identified a document prepared by Diddo, dated April 11, 2002, which was a financial statement, indicating, among other things, total "real estate" worth about $1.7 million ($4.7 million less $ 3 million liabilities). Diddo concluded her statement by indicating that her "net worth" was about $2.14 million. The document was prepared during the formation of Orchard Square, LLC to enable that entity to secure a bank loan. In response to whether Diddo's liabilities had changed significantly since her statement had been prepared, Charles replied that Diddo had acquired interests in Orchard Square and The Grove at Sunrise apartment complexes.

Upon questioning by the court, Charles testified that Diddo received annual distributions from the properties in various amounts. During the year before the trial, there was a distribution of about $3,000 from Monte Cresta Apartments. According to Charles, "The new properties are not distributing any. They owe lots of money to other family entities, so the loans come first before any distributions do." When asked by the court if Diddo received distributions of about $3,000 in total for the year before the trial; Charles replied: "[S]omething like that, yeah. I'm not exactly certain. I don't have that information with me, but, we haven't had rent increases in a long time."

The trial court set aside the award of punitive damages for the following reasons: "The evidence was insufficient as a matter of law to show Diddo Clark's ability to pay. Charles Clark's testimony concerning Diddo Clark's debts, if any, was lacking

foundation. It is also abundantly clear that Diddo Clark was not receiving anything except token distributions from her purported share of the family businesses. When asked about the distribution to Diddo Clark, Charles Clark indicated that there were substantial loans that had to be repaid. Louise Clark testified that the La Posada apartments, in which Diddo Clark was a partner, had no income, so there was no dividend to distribute. She described that partnership as 'not profitable.' " The court also noted that "[e]vidence at trial established that the family businesses were tied up in litigation that had been ongoing for a number of years. Diddo Clark has received fee waivers based on her inability to pay court costs. There was no meaningful evidence of Diddo Clark's ability to pay. There was thus a failure of proof and the award cannot stand." We conclude that the grant of JNOV on the ground that the evidence of Diddo's financial condition was insufficient as a matter of law cannot be upheld.

" 'An award of punitive damages hinges on three factors: the reprehensibility of the defendant's conduct; the reasonableness of the relationship between the award and the plaintiff's harm; and, in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct. [Citations.]' Only the third factor is at issue in this case." (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 679 (*Baxter*).) " '[A]n award of punitive damages cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant's financial condition.' [Citation.] 'Without such evidence, a reviewing court can only speculate as to whether the award is appropriate or excessive.' [Citation.]" (*Id*. at p. 680; see *City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 276 ["[e]vidence of the defendant's financial condition is a prerequisite to an award of punitive damages"].)

There is no "rigid" or specific measure for determining a defendant's financial condition. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 116, fn. 7.) "Net worth is the most common measure, but not the exclusive measure. [Citations]. In most cases, evidence of earnings or profit alone are not sufficient 'without examining the liabilities

side of the balance sheet.' [Citations.] 'What is required is evidence of the defendant's ability to pay the damage award.' [Citation.] Thus, there should be some evidence of the defendant's actual wealth. Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income." (*Baxter, supra,* 150 Cal.App.4th at p. 680.)

Contrary to the trial court's ruling, Charles's testimony regarding Diddo's share of the net value of the properties in which she had an ownership interest at the time of the trial was sufficient to allow the jury to properly assess punitive damages in the sum of $100,000, which represented four per cent of $2.5 million. (See Evid. Code, § 813, subd. (a)(2) [owner of property may testify as to its value]; *Vangel v. Vangel* (1953) 116 Cal.App.2d 615, 627 [partners, as owners, competent to testify as to value of partnership real estate]; *City of Fresno v. Hedstrom* (1951) 103 Cal.App.2d 453, 461 ["owner of property, whether generally familiar with such values or not, is competent to estimate its worth"]; see also *Douglas v. Ostermeier* (1991) 1 Cal.App.4th 729, 749 [court upheld punitive damages award based upon competing valuations of defendants' commercial real properties].)

The trial court's grant of JNOV was based upon the lack of foundational support for some of Charles' testimony, other isolated portions of the evidence, and evidence that was not before the jury, i.e., that Diddo had been granted court fee waivers based on her inability to pay court costs. However, by considering the foundational support for some of Charles' testimony, other isolated portions of the evidence, and evidence that was not before the jury, "the trial court in effect proceeded to weigh the evidence, determine its credibility, and substitute a decision of the court for that of the jury." (*Howell v. Ducommon Metals & Supply Co*. (1950) 101 Cal.App.2d 163, 166.) Neither the trial court, nor this court, has the authority to grant JNOV on those grounds. Because there was substantial evidence to support the jury's award, the grant of JNOV on the claim for punitive damages must be reversed.

## DISPOSITION

The post judgment order granting, in part, Diddo Clark's motion for judgment notwithstanding the verdict, is reversed. Louise Clark is to recover her costs on appeal. The appeals by Steven Clark and the trustees of the Clark Family Trust are dismissed.

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McGuiness, P.J.

We concur:

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Pollak, J.

_____
Jenkins, J.